



May 19, 2000

Ms. Katherine Minter Cary
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2000-2007

Dear Ms. Cary:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135373.

The Office of the Attorney General (the "attorney general") received a request for:

[D]ocuments and information available regarding [the attorney general's] investigation of alleged wrongful acts committed by [General Electric Capital Corporation ("GECC")], its parents, subsidiaries, agents or employees in connection with use of Reaffirmation Agreements in the collection of credit card debt during the period of 1993 to present.

You contend that the submitted documents marked as Exhibits 2 and 3 are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You further contend that the submitted documents marked as Exhibits 4 through 9 are excepted from disclosure under section 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We note that in this instance, GECC submitted for our review a different "representative sample" of responsive documents than that submitted by the attorney general. As a result, this office has considered GECC's arguments against disclosure as they apply to the documents submitted by the attorney general. *See generally* Gov't Code § 552.301(e)(1)(D). Moreover, we note that in reaching our conclusion here, we assume that the "representative sample" of records submitted to this office by the attorney general is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office by the attorney general.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. Section 552.107(1) does not protect purely factual information. *Id.* After reviewing your arguments and the submitted documents, we find that Exhibits 2 and 3 reveal an attorney's legal opinion or advice. Accordingly, the attorney general may withhold Exhibits 2 and 3 in their entirety based on section 552.107(1).

You also claim that Exhibits 4 through 9 contain proprietary information that is excepted from public disclosure under section 552.110 of the Government. Section 552.305 provides that if release of a third party's proprietary information may be subject to exception under section 552.110, a governmental body must make a good faith effort to notify that party of its right to submit reasons why such information should be withheld from disclosure. See Gov't Code § 552.305(d); Open Records Decision No. 542 at 2-3 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In this instance, you inform us that the attorney general provided the notice required by section 552.305(d) to GECC. GECC responded to your notice by asserting that the submitted documents contain confidential and proprietary information which should be excepted from disclosure under sections 552.101 and 552.110. Accordingly, we address GECC's arguments against disclosure under sections 552.101 and 552.110.

Initially, GECC explains to this office that the documents at issue were produced by GECC to the attorney general subject to a confidentiality agreement. Please note that information is not confidential under the Public Information Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Public Information Act. Attorney General Opinion JM-672 (1987). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement between GECC and the attorney general specifying otherwise.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets; and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure

would cause substantial competitive harm to the person from whom the information was obtained.

A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and

- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

In this instance, GECC states that the documents at issue include "financial information, information pertaining to GECC's bankruptcy and debt collection procedures and information about GECC's clients and customers." After examining all of the arguments and the submitted documents, however, we conclude that neither the attorney general nor GECC has established that the documents at issue constitute trade secrets such as to be protected from disclosure by the trade secret aspect of section 552.110(a).

Section 552.110(b) excepts from required public disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *See generally National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. After review of all of the arguments and the submitted documents, we believe that GECC has demonstrated that disclosure of Exhibit 6 would cause GECC substantial competitive harm for purposes of section 552.110(b). Therefore, we conclude that the attorney general must withhold Exhibit 6 from public disclosure pursuant to the commercial or financial information aspect of section 552.110. Because we do not find that GECC has demonstrated how release of Exhibits 4, 5, 7, 8, and 9 could cause substantial competitive harm pursuant to section 552.110(b), we conclude that the attorney general may not withhold that information based on section 552.110.

GECC also asserts that release of Exhibit 9 would impinge on the privacy interests of GECC credit card holders. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information if it is

highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person *and* the public has no legitimate interest in it. *Id.*

This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 545 (1990) (common law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information). We agree that the customer debt amounts in Exhibit 9 are personal financial information excepted from disclosure under section 552.101 in conjunction with common law privacy. We note, however, that we are unable to determine whether the account numbers in Exhibit 9 are the credit card account numbers of the listed GECC customers. If, in fact, the account numbers are the credit card account numbers of the listed customers, then you must also withhold the account numbers under section 552.101 in conjunction with common law privacy. *See* Open Records Decision No. 600 (1992). We do not find that remaining information in Exhibit 9 may be withheld from disclosure based on common law privacy under section 552.101.

In summary, we conclude that the attorney general must withhold Exhibit 6 in its entirety based on the commercial or financial prong of section 552.110, and the customer debts and credit card account numbers in Exhibit 9 based on common law privacy under section 552.101. In addition, the attorney general may withhold Exhibits 2 and 3 in their entirety based on section 552.107(1). The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

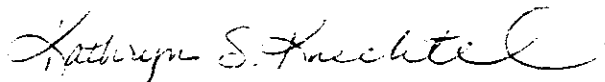
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kathryn S. Knechtel
Assistant Attorney General
Open Records Division

KSK/nc

Ref: ID# 135373

Encl. Submitted documents

cc: Mr. Kevin J. Windels
D'Amato & Lynch
Lawyers
70 Pine Street
New York, New York 10270-0110
(w/o enclosures)